LIBRARY
SUPREME COURT, U. S.

FILED
OCT 18 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 739

METLOX MANUFACTURING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

FRANK SIMPSON,
458 South Spring Street,
Suite 640,
Los Angeles, Calif. 90013,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
1. The Proceedings	4
2. The Facts	5
3. Why Certiorari Should Be Granted	8
Argument	10
1. The Ninth Circuit's Decision in This Case Is in Conflict With N.L.R.B. v. Truitt Manufacturing Co., 351 U.S. 149 (1956)	10
2. The Ninth Circuit's Decision in This Case Is in Conflict With Fruit & Vegetable Packers v. N.L.R.B., 316 F. 2d 389 (D.C. Cir. 1963)	10
3. Certiorari Should Be Granted so That This Court May Resolve the Obvious Confusions and Uncertainties Which Have Been Created by Board and Circuit Decisions With Respect to the Extent to Which Section 8(a)-(5) Requires an Employer to Open His Books	11
4. The Ninth Circuit's Decision That the Strike Was an Unfair Labor Practice Strike Is in Conflict With Other Decisions of the Circuits	13
Conclusion	15

INDEX TO APPENDICES

	Page
Appendix A. Decision and Order of National Labor Relations Board	1
Trial Examiner's Decision	4
Appendix B. Withdrawn Opinion of United States Court of Appeals for the Ninth Circuit	33
Appendix C. Opinion of United States Court of Appeals for the Ninth Circuit	39
Appendix D. Decree	46

TABLE OF AUTHORITIES CITED

Cases	Page
Albany Garage, Inc., 126 N.L.R.B. No. 52, 45 L.R.R.M. 1329	11
Fruit & Vegetable Packers v. N.L.R.B., 316 F. 2d 389	10, 11
N.L.R.B. v. Remington Rand, Inc., 94 F. 2d 862, cert. den. 304 U.S. 576	13
N.L.R.B. v. Scott & Scott, 245 F. 2d 926	15
N.L.R.B. v. Truitt Manufacturing Co., 351 U.S. 149	10, 11, 13
Tennessee Chair Co., 126 N.L.R.B. No. 160, 45 L.R.R.M. 1472	11
White Furniture Co., 161 N.L.R.B. No. 23, 63 L.R.R.M. 1277	12
Winter Garden Citrus Food Co-op. v. N.L.R.B., 238 F. 2d 128	15
Rules	
Rules of the Supreme Court, Rule 19	1
Statutes	
National Labor Relations Act, Sec. 7	3
National Labor Relations Act, Sec. 8(a)(1)	3
National Labor Relations Act, Sec. 8(a)(5)	3, 4, 10
National Labor Relations Act, Sec. 8(d)	4
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 29, Sec. 157	3
United States Code, Title 29, Sec. 158(a)(1)	3, 4
United States Code, Title 29, Sec. 158(d)	4

IN THE

Supreme Court of the United States

October Term, 1967
No. .....

METLOX MANUFACTURING COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Metlox Manufacturing Company prays that a writ of certiorari issue to review the final judgment of the Court of Appeals for the Ninth Circuit refusing to set aside a decision and order of the National Labor Relations Board, on the grounds that the Ninth Circuit's decision is in conflict, on a federal question, with the applicable decision of the Supreme Court and also is in conflict with decisions of other Circuits. (Supreme Court Rule 19.)

Opinions Below.

The National Labor Relations Board's Decision and Order dated July 12, 1965 [R. 36-63] is reported in 153 N.L.R.B. No. 124, 59 L.R.R.M. 1657. A copy is printed as Appendix A hereto.

The first opinion of the Court of Appeals for the Ninth Circuit dated February 6, 1967 was withdrawn as a result of Petitioner's petition for rehearing. The Ninth Circuit's first opinion is unreported. A copy is printed as Appendix B hereto.

The revised opinion of the Court of Appeals for the Ninth Circuit dated May 5, 1967 [R. 78-83] is reported at 378 F. 2d 728. A copy is printed as Appendix C hereto.

Jurisdiction.

The decree of the court below was entered on July 21, 1967 [R. 84-88] and is printed as Appendix D hereto. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

Questions Presented.

1. When an employer claims inability to pay a wage increase and is at all times ready and willing to substantiate that claim by letting an accountant chosen by the union have carte blanche access to the employer's books, can the Board and the Ninth Circuit find the employer guilty of a refusal to bargain merely because the employer places reasonable restrictions on the union's accountant's disclosure of the details of his audit to the union?

2. Particularly, can the Board and the Ninth Circuit find the employer guilty of such a refusal to bargain when both the Board and the Ninth Circuit expressly recognize an employer's right to restrict the disclosure, but both the Board and the Ninth Circuit expressly are unable to indicate the scope of that right?

3. Can the Board and the Ninth Circuit hold a strike to be an unfair labor practice strike when there is no proof that the strike was caused by unfair labor practices?

Statutes Involved.

1. Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. §157:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3)."

2. Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(1) and (5):

> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) . . .
>
> (3) . . . .
>
> (4) . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

3. That portion of Section 8(d) of the National Labor Relations Act, as amended, 29 U.S.C. §158(d), which provides:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . ."

Statement of the Case.

1. The Proceedings.

This petition seeks a review of a decree of the Court of Appeals for the Ninth Circuit refusing to set aside, and enforcing, a decision and order of the National Labor Relations Board that Petitioner violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act and that such violations caused a strike by Petitioner's employees.

Following the Ninth Circuit's original opinion herein, Petitioner petitioned for a rehearing [R. 83A];[1] that petition was granted, the Ninth Circuit's original opinion was withdrawn, and a revised opinion is-

[1] "R" refers to Volume 1, Record on Appeal; "T" refers to Volume II, Record on Appeal (Reporter's Transcript); "GCX" refers to General Counsel's exhibits, "RX" to Petitioner's.

sued. [R. 78-80; 83B.] Judge Barnes, who had concurred in the original opinion (App. B), partially concurred with and partially dissented from the revised opinion. [R. 80-83.]

The decree below was approved by only two of the three judges who heard the matter; Judge Barnes did not join in such approval. [R. 84.]

2. The Facts.

The Union was the duly certified collective bargaining representative of an appropriate unit of Petitioner's employees. [R. 37:23-39.]

During the contract negotiations, the Union requested and Petitioner supplied information from Petitioner's records on seniority and earnings of employees, including piece work rates, Petitioner's group insurance plan, time studies done by Petitioner in setting existing wage rates, and a list of employees on layoff. [R. 38:36-41.]

The information requested by the Union and supplied by Petitioner included employees' minimum base rates; top base rates; Petitioner's review schedule for wage increases; existing fringe benefits (holidays, shift differentials, vacations, group insurance coverage); incentive rates for each product manufactured, by department; payroll review scales as a percent of production; group insurance premium report; group life insurance policy; the method by which the incentive standards were established; average hourly earnings of each employee; total earnings of each employee; hours worked by each employee; samples of the thousands of statistics in connection with incentive rates (Petitioner offered to supply others, if the Union wished); list of

layoffs, whether recalled and if not, why not; group health and accident experience; and standard data calculation sheets related to piece rates. [T. 197-202.]

Petitioner at all times was willing to, and did, provide this multitude of data to the Union, and there is no contention in this case that Petitioner bargained in other than complete good faith with respect to supplying the Union with this exhaustive and detailed information.

The Union proposed a 35 cent per hour wage increase and other cost items, which were rejected by Petitioner on the ground that it was not financially able to give an increase in any cost item. [R. 38:43-39:7.]

In support of its position, Petitioner presented to and discussed with the Union a financial analysis of the cost to Petitioner of the Union's proposals [R. 38:43-39:4] and also Petitioner's profit and loss statements for the past three years. [R. 39:15-65.]

Petitioner offered to give to the Union Petitioner's profit and loss statements for the past 10 years [GCX 2(c), 114:1-5; GCX 2(c), 117:20-118:4], but the Union only wanted the information for 1961, 1962 and 1963. [GCX 2(c), 118:5-119:5.]

The 1961 profit and loss statement showed a profit of $29,966; the 1962 statement, a profit of $5,272; and the 1963 statement (through November 30, 1963), a loss of $4,597. [R. 39:62.]

As shown by the profit and loss statements, Petitioner could not afford to pay the cost increases proposed by the Union; the annual cost of the Union's initial proposal was $218,188 [RX 1] and the Union never

reduced its proposal below an annual cost of $68,022 [RX 2].

The Union wanted to examine Petitioner's books to see if there was "poor management," or if there were any "deadheads" on the payroll, or if Petitioner's assets were being "bled." [R. 46:30-33.]

Petitioner offered to permit an examination of its books, subject only to the conditions that (1) the examination be in Petitioner's office (2) by a Certified Public Accountant chosen by the Union and approved by Petitioner (3) with the cost borne by the Union, and (4) with the details of Petitioner's financial records not to be disclosed to any third parties, including the Union, except to advise the Union as to "whether or not the Company's representations (already submitted to the Union) are true." [R. 40:30-41:23; GCX 3(d).]

Petitioner also offered to give the Union's accountant carte blanche to examine whichever of Petitioner's records the accountant deemed necessary in order for him to verify Petitioner's representation as to Petitioner's inability to pay. [GCX 3(f).]

The Union agreed to each of these conditions, except for the confidentiality of Petitioner's records. [R. 41:28-37; GCX 3(e).]

Thus, as found by the Trial Examiner and the Board (and affirmed by the Ninth Circuit), the "only significant difference between the Respondent [Petitioner herein] and the Union is the extent to which the information developed by the accountant in the course of his examination of company records can be disclosed to the Union." [R. 44:30-34.]

It was on the basis of this "only significant difference" that the Trial Examiner, the Board and the Ninth Circuit convicted Petitioner of a refusal to bargain; and yet neither the Trial Examiner, the Board nor the Ninth Circuit were able to say how much further, in their opinion, Petitioner should have permitted disclosure of the information developed by the Union's accountant. Indeed, both the Trial Examiner and the Board (with the express approval of the Ninth Circuit [R. 80]) expressly abdicated their ability to state the extent to which they believed Petitioner could have kept its books confidential, and expressly stated that they were unable to say to what extent Petitioner was entitled to protect its books from the eyes of others than the accountant without being held guilty of a refusal to bargain. [R. 47:40-43; R. 80.]

Nevertheless, and despite the Board's own express inability to spell out the extent to which the information developed by the Union's accountant could be kept confidential, and despite Petitioner's complete willingness at all times to permit substantiation of its inability to pay a wage increase or to give other requested cost items, the Board held that Petitioner failed to bargain in good faith. [R. 47:37-40; 48:29-32; R. 62-63.]

It is from the Ninth Circuit's decree enforcing the Board's order that Petitioner seeks relief.

3. Why Certiorari Should Be Granted.

The Ninth Circuit's decision in this case:

a. is in conflict, on a federal question, with the applicable decision of the Supreme Court; and

b. is in conflict with decisions of other Circuits.

These conflicts present important questions as to the administration of the National Labor Relations Act, as amended, and certiorari should be granted to resolve these conflicts.

The importance of this case to the administration of the National Labor Relations Act is underscored by the conflict between the Ninth Circuit's decision and a decision on the same point by the District of Columbia Circuit, by the conflict between the Ninth Circuit's decision and a decision of this Court, by the Board's and the Ninth Circuit's own acknowledged inability to resolve the questions presented by this case, and by the fact that even the Ninth Circuit was split two-to-one.[2]

And, of course, it is of paramount importance to Petitioner that Petitioner has been held guilty of a refusal to bargain when not even the combined talents of Trial Examiner, Board and Ninth Circuit are able to say what Petitioner should have done differently in order to, in the opinion of these lower tribunals, have bargained in good faith. It is basically unfair to hold Petitioner guilty of a refusal to bargain, when, as Judge Barnes points out, Petitioner "has at all times been willing to substantiate its claim of inability to pay the requested wage increases" [R. 82], and when neither Trial Examiner, Board nor Ninth Circuit is capable of indicating how much additional disclosure is required in order, in their opinion, for Petitioner to be said to be bargaining in good faith.

---

[2]The uncertainty and confusion which should be resolved by granting certiorari herein are highlighted by the unusual fact that both the Ninth Circuit decision and the conflicting District of Columbia Circuit decision were written by the same Judge, Judge Washington. Petitioner expressly relied below on Judge Washington's District of Columbia decision, but Judge Washington does not even refer to it in his conflicting Ninth Circuit decision in this case.

ARGUMENT.

1. The Ninth Circuit's Decision in This Case Is in Conflict With N.L.R.B. v. Truitt Manufacturing Co., 351 U.S. 149 (1956).

In *Truitt,* this Court has laid down the guide-line that Section 8(a)(5) of the Act requires that an employer asserting inability to pay a wage increase must provide "some sort of proof" of the accuracy of the assertion, but it does not automatically follow that in every case in which economic inability is raised as an argument, the employees are entitled to substantiating data. (351 U.S. at 153-154.)

The test of good faith bargaining is met if the employer *attempts* to substantiate the claim of inability to pay. (351 U.S. at 153.)

Here, Petitioner not only provided the Union with profit and loss statements, but offered to let a certified public accountant, chosen by the Union, conduct a carte blanche audit of Petitioner's books to verify Petitioner's representations as to inability to pay. [R. 41:4-15; GCX 3(f).]

Since Petitioner has met the requirements of *Truitt,* the Ninth Circuit's decision that Petitioner did not bargain in good faith is in conflict with *Truitt* and certiorari should be granted.

2. The Ninth Circuit's Decision in This Case Is in Conflict With Fruit & Vegetable Packers v. N.L.R.B., 316 F. 2d 389 (D.C. Cir. 1963).

In *Fruit & Vegetable Packers,* the District of Columbia Circuit held that an employer may circumscribe the manner in which he makes his records available for inspection. (316 F.2d at 391.)

Ironically, the decision in *Fruit & Vegetable Packers* was written by Judge Washington, who, sitting by designation, also wrote the Ninth Circuit's decision in the present case. Although Petitioner repeatedly cited and relied upon *Fruit & Vegetable Packers* in its briefs below, [see, e.g., Petitioner's Petition for Rehearing, R. 83A] the decision in the present case does not even refer to *Fruit & Vegetable Packers,* not even to attempt to distinguish it.

Since the Ninth Circuit's decision in the present case is in conflict with *Fruit & Vegetable Packers,* certiorari should be granted.

3. Certiorari Should Be Granted so That This Court May Resolve the Obvious Confusions and Uncertainties Which Have Been Created by Board and Circuit Decisions With Respect to the Extent to Which Section 8(a)(5) Requires an Employer to Open His Books.

As this Court noted in *Truitt,* in the Board's decision in that case, the Board held that substantiation of the employer's inability-to-pay position requires no more than "reasonable proof." (351 U.S. at 151-152.)

In *Albany Garage, Inc.,* 126 N.L.R.B. No. 52, 45 L.R.R.M. 1329 (1960), the Board itself held that merely furnishing profit and loss statements (which is less than Petitioner offered in the present case) is sufficient to meet the requirements of good faith bargaining. See also *Tennessee Chair Co.,* 126 N.L.R.B. No. 160, 45 L.R.R.M. 1472 (1960).

In the present case, although the Board acknowledges that an employer is not required to permit an unlimited audit [R. 46:44-47:1], the Board expressly is

unable to state the scope of the audit which it believes should be permitted. [R. 47:40-43.]

In *White Furniture Co.*, 161 N.L.R.B. No. 23, 63 L.R.R.M. 1277 (1966), the Board asserts that, in the present case, the Board "declined to require an employer [Petitioner Metlox herein] to give a union such sensitive information as executive salaries and detailed breakdowns of operating expenses." (63 L.R.R.M. at 1278.) However, this purported limitation is not in fact found in the decision in the present case; instead, as noted, the Board actually stated that it was unable to say what information must or must not be given. [R. 47:40-43.]

The history of the present case illustrates the uncertainty and confusion which exists.

In the initial decision of the Ninth Circuit in this case, Judge Barnes, although concurring, stated that "I believe that if the Board's order is enforced as it stands, this case will make law beyond the implications of the facts of this case." (App. B.)

Thereafter, rehearing was granted, and this time Judge Barnes dissented from the enforcement of the Board's order as it stands [R. 80; App. C.], pointing out that "Metlox has at all times been willing to substantiate its claim of inability to pay the requested wage increases." [R. 82; App. C.]

Also, as Judge Barnes points out, neither the Board's order nor the Ninth Circuit's decision give any indication of what Petitioner, on pain of contempt, must do to comply with the law. [R. 82; App. C.]

Also, the Trial Examiner, the Board and the Ninth Circuit have, contrary to the evidence, said that Pe-

titioner's offer limited the Union's accountant to a naked "yes or no" answer as to whether the profit and loss statements were "true." [R. 47:37-40; 48:29-32; R. 80.] However, Petitioner's offer was by no means so limited; Petitioner offered to let the Union's accountant examine whatever records he deemed necessary to establish proof of Petitioner's representations of *financial position* [GCX 3(d); GCX 3(f)] which, of course, would include proof of Petitioner's inability to pay a wage increase or to give other cost items.

In view of the Board's and the Ninth Circuit's departure in the present case from the standard that the Board itself urged upon this Court in the *Truitt* case (*i.e.*, that all that is required is "reasonable proof"); in view of the Board's and the Ninth Circuit's own express inability in the present case to resolve the question of how far the books must be bared; in view of the Board's and the Ninth Circuit's saying, contrary to the evidence, that Petitioner was limiting the accountant to a naked "yes or no" answer as to whether the profit and loss statements were "true"; and in view of the two-to-one split in the Ninth Circuit, certiorari should be granted so that these confusions and uncertainties created by the Board and the Ninth Circuit may be set at rest by this Court.

4. The Ninth Circuit's Decision That the Strike Was an Unfair Labor Practice Strike Is in Conflict With Other Decisions of the Circuits.

If a strike would have taken place *even if* a company had not engaged in an unfair labor practice, then the strike is not an unfair labor practice strike. (*N.L.R.B. v. Remington Rand, Inc.*, 94 F. 2d 862, 872 (2 Cir. 1938), cert. den. 304 U.S. 576 (1938).)

The only witness called by the General Counsel with respect to the reasons for the strike was Mrs. Riley, the Union's Financial Secretary. On direct examination by the General Counsel, Mrs. Riley testified that *after* (not before) the strike had occurred, the Union representatives explained ex post facto to the employees ("so they would know about it") why they had struck, and listed the reasons as stalling tactics, refusal to bargain, unfair labor practices and Mr. Shaw's complete ignoring of the Union. [T. 167.]

As to the situation *before* the strike, Mrs. Riley testified on cross-examination by Petitioner that the strike was an economic, not an unfair labor practice, strike ("money . . . probably was the basic concern with the people" [T. 172]) and that [T. 175]:

> "A: . . . at practically every meeting, Mr. Rail [the Union agent] assured us that more than likely we could settle this without a strike. He didn't feel that it would come down to the point of having a strike.
>
> Q: Did he say—settle what, did he say? A. Basically, a good working contract for the people."

Mrs. Riley also testified on cross that "at all the subsequent meetings," Mr. Rail said that the matter could be settled "very easily without a strike" if such requests as wages, vacation pay, holidays, seniority, job security and insurance were met. [T. 180.]

Here the only evidence that the strike was an unfair labor practice strike (rather than an economic strike) was Mrs. Riley's testimony that *after* the strike the Union representatives told the employees that they had struck in protest of unfair labor practices; but a

mere assertion by a union that it is striking to protest an unfair labor practice does not make the strike an unfair labor practice strike, particularly where (as here) such a finding is based upon the single statement of a highly partisan witness long after the event. (*N.L.R.B. v. Scott & Scott*, 245 F. 2d 926, 929-930 (9 Cir. 1957).) Under such circumstances, a conclusion (as here) that a strike is an unfair labor practice strike is "inconclusive, argumentative and inconsequential." (245 F. 2d at 929-930.) There must be proof of causal connection between an unfair labor practice and a strike to justify a finding that it is an unfair labor practice strike. (*Winter Garden Citrus Food Co-op. v. N.L.R.B.*, 238 F. 2d 128, 129 (5 Cir. 1956).)

Because there is no substantial evidence in the present case of causal connection between any unfair labor practice by Petitioner and the strike, the Ninth Circuit's decision affirming such a finding by the Board is in conflict with the other above-cited decisions. For this reason, certiorari should be granted.

Conclusion.

The Ninth Circuit's decision in this case is in conflict with the applicable decision of this Court and with decisions of other Circuits. The decision (and the two-to-one split thereon by the Ninth Circuit) emphasizes the uncertainty and confusion surrounding the entire question of how far an employer is entitled to protect his books or must bare them when he is unable to pay increased wages or other cost items. The fact that neither the Trial Examiner, the Board nor the Ninth Circuit is able to resolve the question illustrates the importance of this Court's granting certiorari.

Here, Petitioner not only supplied a great multitude of pertinent data to the Union on a wide variety of subjects, but also agreed to a carte blanche audit by the Union's accountant with respect to Petitioner's inability-to-pay; accordingly, under all the circumstances, Petitioner should not be held guilty of a refusal to bargain solely because reasonable restrictions were placed upon the accountant's disclosure of the details of his audit to the Union.

Respectfully submitted,

FRANK SIMPSON,
Attorney for Petitioner.

APPENDIX A.

Decision and Order of National Labor Relations Board.

United States of America, Before the National Labor Relations Board.

Metlox Manufacturing Company and International Brotherhood of Operative Potters, AFL-CIO. Cases Nos. 21-CA-5553, 21-CA-5811.

DECISION AND ORDER

On February 4, 1965, Trial Examiner James R. Webster issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in cerain unfair labor practices as alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof. The Charging Party excepted only to the remedy recommended by the Trial Examiner and filed a supporting brief. The General Counsel filed cross-exceptions and a single brief in support thereof and in answer to Respondent's exceptions. The Respondent filed separate briefs in answer to the Charging Party's exceptions and to the General Counsel's cross-exceptions.

Prsuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Na-

tional Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, the briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that Respondent, Metlox Manufacturing Company, Manhattan Beach, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Add the following as paragraph 2(c), the present paragraph 2(c) and those subsequent thereto being consecutively relettered:

"(b) Notify the above-mentioned employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of

1948, as amended, after discharge from the Armed Forces."

2. Add the following immediately above the double line at the bottom of the Appendix attached to the Trial Examiner's Decision:

NOTE: We will notify the above-mentioned employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

Dated, Washington, D. C. Jul 12, 1965.

Frank W. McCulloch, Chairman
Gerald A. Brown, Member
(Seal) Sam Zagoria, Member
National Labor Relations Board

Trial Examiner's Decision.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

Metlox Manufacturing Company and International Brotherhood of Operative Potters, AFL-CIO. Cases Nos. 21-CA-5553, 21-CA-5811.

George A. Pappy, Esq., of Los Angeles, Calif., for the General Counsel.

Frank Simpson III, Esq., of *Sheppard, Mullin, Richter & Hampton*, of Los Angeles, Calif., for Respondent.

Alfred M. Klein, Esq., of *Rose, Klein & Marias of* Los Angeles, Calif., and *Plato E. Papps, Esq.*, of Washington, D. C., for the Charging Party.

Before: *James R. Webster*, Trial Examiner.

Statement of the Case

This proceeding, with all parties represented, was heard before me in Los Angeles, California, on November 18 and 19, 1964, upon a consolidated complaint of the General Counsel and answer of Metlox Manufacturing Company, herein called Respondent. A complaint was issued on July 1, 1964, in Case No. 21-CA-5811 and a consolidated amended complaint was issued on July 27, 1964, in Cases Nos. 21-CA-5553 and 21-CA-5811, upon charges filed on March 2, 1964 and amended on June 25, 1964, in Case No. 21-CA-5811, and upon a charge filed on September 17, 1963, in Case No. 21-CA-5553. The consolidated complaint alleges that Respondent violated Sections 8(a) (5) and (1) of the National Labor Relations Board, as amended, herein called the Act.

Upon the entire record and my observation of the witnesses, I hereby make the following:

Findings of Fact

I. The business of the Respondent

The Respondent is a California corporation with its principal office and place of business located in Manhattan Beach, California, where it is engaged in the manufacture of ceramic dinnerware. In the course and conduct of its business during the past 12 months, Respondent shipped from its California plant products valued in excess of $50,000 directly to points located outside the State of California, and during the same period has received at its California plant products valued in excess of $50,000, which were shipped directly from points outside the State of California.

I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The labor organization involved

The International Brotherhood of Operative Potters, AFL-CIO, herein called the Union, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. The alleged unfair labor practice

A. *Introduction and issues*

Following a Board-conducted election on March 22, 1963, the Regional Director for the Twenty-first Region of the Board issued on June 11, 1963 a certification that the Union had been duly selected and constitutes the exclusive collective bargaining representa-

tive of the employees of Respondent in the following described appropriate unit:

> All production and maintenance employees, including shipping and receiving employees, and leadmen employed by the Respondent at its Manhattan Beach, California, plant, excluding office clerical employees, watchmen, guards, designers, professional employees, and supervisors as defined in the Act.

At all times since June 11, 1963, the Union has been the representative for the purposes of collective bargaining of the employees in this unit.

Collective bargaining meetings were held by the Union and Respondent on the following dates:

November 18, 1963	February 17, 1964
November 29, 1963	March 13, 1964
December 18, 1963	April 3, 1964
January 13, 1964	April 27, 1964
January 14, 1964	

Throughout negotiations Respondent contended that it was unable to give a wage increase or other monetary benefits as requested by the Union because of its financial condition. In support of this bargaining position, Respondent furnished the Union with a profit and loss report for the years 1961, 1962, and 10 months of 1963, being the three preceding fiscal years. Respondent prepared and made available to the Union a statistical analysis showing the additional costs or expenses that would be incurred by Respondent by granting wage increases in amounts ranging from 5¢ per hour to 35¢ per hour. The Union proposed a wage increase of 35¢ per hour.

The issues in this case are:

(1) Whether or not Respondent has engaged in bad faith bargaining by the limitations it has placed on the Union's accountant as to the nature and contents of his report to the Union following his inspection of Respondent's books and records.

(2) In the event it is found that Respondent engaged in an unfair labor practice following the settlement agreement in Case No. 21-CA-5553, approved October 29, 1963, then the issue is presented as to whether or not Respondent refused to meet with the Union in collective bargaining following the certification on June 11, 1963, and continuing to the date of the settlement agreement.

(3) Whether or not the strike of employees of Respondent which commenced on April 2, 1964, was caused by any conduct of Respondent that has been found to be an unfair labor practice.

There is no allegation in the complaint nor contention by the General Counsel that any conduct of Respondent, since the settlement agreement of October 29, 1963, constitutes a violation of the Act other than Respondent's refusal "to furnish the Union with records and other probative material necessary for the Union to discharge its functions as the statutory bargaining representative of the employees," and that by such conduct Respondent refused to bargain in good faith.[1]

---

[1]The attorney for the charging party sought to enlarge the scope of the allegations of the complaint to include a refusal to bargain by Respondent by its taking of adamant positions with reference to proposals. The charging party made an offer of proof in support of its position, but neither in the offer of proof nor in the transcript of the bargaining sessions (which are copious but not complete) do I find any factual support for the charging party's contention. The offer of proof was rejected.

B. *Statement of facts*

During the course of the contract negotiations the Union requested and Respondent supplied information from company records on seniority and earnings of employees, including piece work rates, the company's group insurance plan, time studies performed by Respondent in setting existing wage rates, and a list of employees on layoff.

The Union proposed a wage increase of 35¢ per hour; and at the meeting of November 29, 1963, the second meeting, Mrs. Selvin, negotiator for Respondent, presented and discussed a document on the subject of "Analysis of Labor Cost Increases Attached to Possible Union Contract Provisions." This document contains a financial analysis as to the increased costs to Respondent for the monetary proposals of the Union other than wages, and also the increased costs for wage increases of 5¢ per hour, 10¢ per hour, 25¢ per hour and 35¢ per hour. She rejected all of the Union's cost proposals and contended that Respondent was not financially able to grant the Union's cost proposals or to make a counterproposal containing any increase on any cost item.

At the next meeting, December 18, 1963, the Union requested that Respondent's financial records be made available and this matter was discussed at some length. At the next meeting, January 13, 1964, Respondent submitted a document containing the following information from company records:

Metlox Manufacturing Company

Statements of Operations

	January 1, 1961 to December 31, 1961	January 1, 1962 to December 31, 1962	January 1, 1963 to November 30, 1963
Net Sales—Less Sales Discounts	2,741,500.89	2,753,875.63	2,415,645 —
Factory Shipping Wages	946,594.22	930,633.20	775,501 —
Other Salaries and Wages	487,461.21	508,092.05	477,969 —
Holiday and Vacation Pay	17,507.20	20,855.48	18,568 —
Payroll Taxes	60,511.34	86,602.69	85,590 —
Group Insurance	13,097.42	14,427.35	12,614 —
Workmens Compensation Insurance	19,118.34	19,337.96	21,166 —
Materials supplies, Expenses	568,506.27	559,242.92	504,069 —
Utilities	79,192.37	82,095.34	76,691 —
Insurance	23,553.60	23,434.20	23,007 —
Taxes	67,714.54	43,396.68	34,449 —
Advertising and Commissions	317,005.87	348,290.31	292,955 —
Financial Expenses, Interest, Factoring	88,656.68	90,286.54	81,752 —
Depreciation	22,635.57	21,908.48	15,911 —
Total	2,711,534.63	2,748,603.20	2,420,242 —
After Tax Profit or (Loss)	26,966.26	5,272.43	(4,597 —)

By letter dated January 17, 1964, to Respondent from Alfred M. Klein, attorney for the Union, the Union requested substantiating data as follows:

> In our opinion, and under the Board authorities, your summary of financial items is insufficient to enable the union to meet its obligation of bargaining in good faith. Substantiating information and data of the general headings are hereby requested, and particularly of those figures set forth under the following main listings for the three years indicated:
>
> Net Sales - less sales discounts
> Factory and Shipping Wages
> Other Salaries and Wages
> Materials, Supplies, Expenses
> Advertising and Commissions
> Financial Expenses, Interest, Factoring
> Depreciation
>
> Request is, accordingly, made that an audit or a detailed accounting of these items be forthwith furnished and toward that end, the union is agreeable to designating a certified public accountant to obtain the same on your premises with direct instructions to keep the information confidential from third parties, competitors and the like.

By letter dated February 12, 1964, Respondent set forth the conditions under which it would permit an inspection of its financial and related records, as follows:

> Let us get the matter of an audit of the Company's records defined:
>
> As I understand it the Union was not satisfied with the information submitted in support of the

Company's claim that its financial situation does not justify additional cost items at this time and demanded further proof of the matter. I have, heretofor(sic), submitted profit and loss statements for three successive years. Also I submitted figures outlining cost of the Union's demands and showing conclusively that these demands could not possibly be met on the Company's present volume of business. I have made the following offer to prove our position:

1. The books and records may be examined in our office.
2. Such examination to be made by a Certified Public Accountant chosen by the Union and approved by the Company.
3. All costs of such examination to be borne by the Union.
4. Such accountant work directly with the Company's accountant who will make available to him the Company's records and give him necessary information pertinent to such records and allow him to examine them to the extent he [the accountant chosen by the Union] deems necessary.
5. The accountant chosen by the Union to supply Union only with the information as to whether or not the Company's represention (already submitted to the Union) are true, and that the accountant be specifically instructed that details of the Company's financial records are not to be disclosed to any third parties whatsoever, including the Union.

> If we can agree on these conditions then we are ready to allow an approved accountant to proceed at once with the examination of our records.

Mr. Klein for the Union replied by letter of February 14, 1963, stating, among other things, as follows:

> Subject to the qualification that the attorneys for the Union, to the extent necessary in representing the Union, may be supplied the information, we are certainly agreeable that the report of the Union's accountant be solely limited to the Union's information and that the financial records will not be disclosed to any third parties whatsoever. Obviously, the details making up the financial statement, we believe, should be furnished to the Union and that a failure thereof also constitutes a refusal to bargain in good faith.

Mrs. Selvin for Respondent answered by letter dated February 15, 1964, in part, as follows:

> Mr. Rail [a negotiator for the Union] has insisted that the Union has the right to any of our figures for any use it wants to make of them. He has stated that it will have the right to negotiate *as to whether or not some of our expenditures should have been made.* I have repeatedly informed him that we do not intend to negotiate on the basis of any of our expenses which have already been incurred which do not bear on the matter of employee payments. He has specifically stated, in substance, that the Union has the right to determine if we are paying our supervisory and management people *more than we should* and says that if the Union believes this to be true, they

have the right to negotiate other terms for such management employees. This is, of course, ridiculous, and we are not making the figures available for any such purpose.

I believe you will agree with me that we are not required to negotiate the remuneration of our executives and supervisors with the Union. In examing (sic) our records, an accountant would necessarily see this information in detail. In view of the conversation I have already had with Mr. Rail about the matter, I have insisted that details of this nature must not be divulged to the Union. I think it entirely proper for an accountant to inform the Union that our statement with respect to our executive and supervisory personnel is a true statement or a false statement, whatever he finds it to be.

I know of no precedent where an employer has been required to lay bare all details of his financial position to the Union and where such details might be given to a union for any use it may want to make of them.

Our position on this matter is that we will permit an accountant to go into the details of each of our classifications of expenditures. My concept of our duty is that we shall make available to the accountant proof of our statements—and to the extent we have made them. It will certainly take an action by the Supreme Court to get us to change that position.

I would suggest that you have Mr. Rail bring his tapes of the various conferences and that you listen to our offer to him. I think you would get a much better picture of what I have offered.

I have now offered *only proof* that the Profit and Loss Statement as I presented it, is a true and correct Profit and Loss Statement. Our books will reflect this. Your accountant will be free to determine the particulars which add up to the Profit and Loss figures which we give to the Union but we must insist that he do not divulge these particulars to the Union.

With this further clarification we are ready to permit an accountant to examine our books.

Mr. Klein for the Union answered by letter of February 19, 1964, in part, as follows:

It now appears that there is one remaining area which needs clarification. Obviously, the various breakdowns are needed by the union to intelligently bargain in good faith. I can certainly agree with you that the audit will only be used for that purpose and for none other. I fully agree with you that the union cannot negotiate as to the expenditures you have made nor the salaries you are paying supervisors and management employees. On the other hand, we believe it is within their prerogative to comment upon a relationship which salaries to unit workers should bear to salaries of white collar workers. Also, I believe they certainly can comment upon whether the failure to show a satisfactory operating statement is due to a deliberate bleeding of the assets by officers and/or controlling stockholders. For example, if a corporation has a net income of $100,000.00 and is paying a president a $1,000,000.00 salary, I am positive the right of any person to argue that the

corporation was being bled for that one salary is evident, even though that person cannot negotiate the president's salary.

I, therefore, agree with you that your company is not required to negotiate the remuneration of the executives and supervisors with the union, although, to repeat, this information may well be necessary for the union to bargain in good faith even though it be kept strictly confidential. I further agree with you that no further use of such details can or should be made by the union.

Mrs. Selvin for Respondent answered by letter of February 29, 1964, as follows:

Replying to your letter of February 19 concerning the matter of a certified public accountant checking the figures of Metlox Manufacturing Co. which were submitted to Mr. Rail in the bargaining conference of January 13, 1964, and which have been the subject of considerable correspondence between us.

It is the Company's position (and on this position we will rest our case) that the Union is entitled *only to figures necessary to the bargaining.* We have taken the position that the Company is financially unable to grant the increases which the Union demanded and we have offered proof of the figures we submitted, which included the Company's Profit and Loss Statements for the years 1961, 1962 and 1963 to November 30 (which was the latest date available at the time of submission). We believe our obligation is covered by our offer to prove that our submission was true.

Our offer is set forth at length in our letter of February 12, 1964, and, since you claimed not to understand it completely, I clarified the matter in a further letter to you on February 15, 1964.

This offers the Union full opportunity to substantiate our claim. We stand on our right *not to have the details of the various classifications of expense, other than that pertaining to the factory and shipping employees,* made available to the Union for any purpose. It cannot possibly have any relativity to bargaining since the classifications which we will give your accountant an opportunity to check so that he is able to inform the Union whether our representations as to our financial position are true or false, since they are not negotiable matters, as you have yourself admitted in your letter of February 19.

Needless to say, we recognize that the Union is entitled to any specific information pertaining to the employees in the bargaining unit and to that extent we will give your certified public accountant permission to make such figures available to the Union which are applicable directly to the bargaining unit.

I have submitted the name of Steres, Alpert & Company, Certified Public Accountants, 6404 Wilshire Boulevard, as having been designated by the Union to undertake this investigation. The Company has no objection to this firm of accountants representing the Union in this matter.

When and if we can come to an agreement as to the extent of the material to be made available to the Union by the accountant, we are ready to pro-

ceed and the investigation can commence at once. We will, of course, insist that our full understanding shall be set forth in writing.

Thus, as is also indicated by attorney for Respondent in his brief, the only significant difference between the Respondent and the Union is the extent to which the information developed by the accountant in the course of his examination of company records can be disclosed to the Union.

C. *Conclusions*

Good faith collective bargaining contemplates an earnest desire on the part of the parties to reach a mutually acceptable agreement. It means the taking of action that will facilitate the bargaining mechanics and processes. The Board has held that this means the furnishing of pertinent and relevant information by a company to a union to enable the union to negotiate intelligently on matters of wages and working conditions, etc.[2]

But, for a review or study of an employer's financial records and related files, the Board and the courts have limited a Union's view of these records and files to situations where the employer pleads an inability to

---

[2]It has been held that an employer must furnish data upon appropriate request from the union on the following subjects: Dates of employment and seniority standing of employees, *Stein-Way Clothing Co.* (C.A. 6) 36 LRRM 2576; job classifications and job descriptions, wage rates and rates ranges, *Dixie Corp.*, 32 LRRM 1259, 105 NLRB No. 49; data on piece rates, *Skyland Hosiery Mills*, 34 LRRM 1254, 108 NLRB No. 190; on incentive wage plans, *City Packing Co.*, 30 LRRM 1004, 98 NLRB No. 203; on time studies, *Otis Elevator Co.*, (C.A. 2) 33 LRRM 2129; and employees' group insurance data, *Phelps Dodge Copper Products Co.*, 31 LRRM 1072, 101 NLRB No. 103.

pay a wage increase, and in these situations, as always, the prime consideration is not the bare refusal to furnish data, but whether under the circumstances in a case, the employer by his conduct is doing violence to the principles of good faith bargaining. Respondent having placed on the bargaining table the issue of its ability to pay a wage increase, has placed a need on the part of the Union, if it is to bargain intelligently on the issue, to "know" and analyze the facts material to this issue. The facts are exclusively within the control and possession of Respondent.

The question is "how much" information should a union have from an employer's records in order to bargain intelligently on the matter of wages where the employer pleads financial inability to pay. Is the three-year profit and loss report submitted by the Respondent herein, with right of verification sufficient?

The Union contends that it is not; that conclusionary facts and figures can be misleading; and that the Union needs to know the facts and figures upon which they are based. From a complete analysis of the records of the Company, the Union might then be in a position to make efficiency recommendations or urge changes of one kind or another which would justify or facilitate a wage increase. For example, as Union Representative Rail expressed it during negotiations, the Union would like to know "what title they [company officials] carry, what job they do, if they are deadheads on the payroll," and if "all of the profit is being bled off somewhere." From the Union's point of view, this and other information from Respondent's financial records are germane to the issue of Respondent's ability to pay a wage increase; and with this in-

formation the Union would be on an equal footing with Respondent to discuss this issue.

Respondent takes the position that information as to salaries, bonuses and commissions, etc., paid to salaried personnel and personnel outside the bargaining unit is immaterial, irrelevant and confidential; that the Company has substantiated its plea of financial inability to pay with a profit and loss report, with opportunity for the Union to verify it, and that this ends the Respondent's obligation to substantiate its position. Must an employer bare all of its records for a Union to engage in a "fishing expedition" in a search for items on which to make efficiency recommendations or for flaws in managerial judgment which the Union might use as arguments for a wage increase?

Accountant Steres, the certified public accountant chosen by the Union and approved by Respondent, and whom I find to be an expert in the field of accounting and auditing, testified regarding the auditing of a company's records to determine financial soundness. He stated that a profit and loss summary does not necessarily reflect an accurate picture of the financial condition of a company. A profit and loss report is one factor to consider in arriving at a judgment or opinion as to the financial soundness of a company. He stated that to analyze a financial statement, or to ascertain the financial condition of a company, one would need to know whether any of the generally accepted accounting methods is used; whether it has been applied consistently, "because a change in method can tend to distort figures"; whether there has been non-recurring or unusual items in any particular year or years, as for example a law suit; whether management

decisions on expenditures and the like (the areas where discretion usually exists with management) are consistent with prior years. He indicated other areas where discretionary judgment of management could affect the profit and loss of a company to include judgment as to what may be incurred in the way of bad debts for a year and judgment as to the use or life of an item subject to depreciation, or the method of depreciation selected. Also a profitable business may have its profits drained for a number of years by non-operational items such as funded indebtedness. Evaluations of inventories can vary depending on whether inventory costs include cost of material, cost of labor and cost of other manufacturing expenses (overhead expenses) which were incurred in order to produce a given product. And it would be desirable to know whether the method of evaluating inventories has been consistent over the years. Where the costs of material or labor on items that go into inventory change, then the inventory evaluation can vary depending on whether a company operates on a first in-first out basis or last in-first out basis. Also a profit and loss report is affected by the method of accounting on maintenance expenses and repairs—whether they are written off currently or whether they are capitalized and spread over their useful life. Income can be depressed by expensing currently the major repairs. The choice in expensing currently or capitalizing can be applied to purchases and to research and development costs with resulting effects on annual profit and loss reports.

Sizeable changes in salaries paid company officials, usually a discretionary item, can change the profit and loss picture. An examination of company records could

reveal whether abrupt and significant salary changes have recently been made; also it might reveal areas where, in the judgment of management efficiency surveyors, unprofitable expenditures are being made.

Respondent objects to an examination by the Union to ascertain if there is "poor management," or if there are any "deadheads" on the payroll, or if the assets of the Respondent are being "bled"; and these are matters that the Union would like to ascertain.

An examination of Respondent's financial records here can be divided into three purposes—one, to verify the accuracy of the figures contained in the offered profit and loss report; two, to determine if there have been any recent changes or temporary factors which cause the report to be misleading and not to constitute a fair representation of the company's basic financial soundness; and three, to enable the Union to suggest or urge efficiency or other changes which could make more funds available for wages.

A union's relationship to an employer is the business relationship of a trader or bargainer. Neither the union nor the employees it represents has the affinity with a company as does a stockholder on matters of management and direction of a company, although a poorly managed company affects an employee's welfare and finances as well as a stockholder's. A union is not entitled to review the records of Respondent for the third purpose listed above. But, good faith bargaining, in requiring an employer to substantiate his inability-to-pay plea, requires the employer to show that the figures of profit and loss are not only accurate but that they do or do not constitute fair representations of the company's financial condition. That is, to bargain in good

faith, Respondent should permit an examination of its records for purposes one and two listed above.

There is a question of semantics in interpreting the words used by Mrs. Selvin, as to whether she would permit the accountant chosen by the Union only to verify the figures in the profit and loss report as figures taken from the company records, or whether they constitute a fair representation of the company's financial condition—that is, among other things, whether there are recent changes or temporary factors or other considerations that would cause the conclusionary figures to be misleading. (She stated that the Union would have "full opportunity to substantiate our claim"; that "we are going to allow the check for the purpose of determining that we have given you accurate and truthful information"; and at another time "I have now offered *only proof* that the Profit and Loss Statement as I presented it, is a true and correct Profit and Loss Statement.")

Assuming that Mrs. Selvin intended the accountant to ascertain whether or not the profit and loss statement was a fair representation of Respondent's financial condition, he was not to reveal to the Union any details or make any elaboration on his findings. Although accountant Steres indicated he could give a yes or not answer following an auditing of Respondent's financial records, he expressed the view that a negative answer would be of questionable value as "there are so many factors that could be involved that would cause me to feel that these statements were not fair." He questioned the propriety of making a negative statement, on which any person would rely or take action, without explaining or substantiating his conclusions.

I find that Respondent in limiting the accountant to a "yes or no" report is not substantiating or permitting substantiation of its inability-to-pay plea, and by this conduct it has not bargained in good faith.[8] I cannot with preciseness indicate here the scope that the accountant's report should take. Elaboration or explanation of his conclusions should be permitted; on the other hand, the report need not be an efficiency survey and critique.

D. *The strike and reason therefor*

During contract negotiations the Union held periodic meetings of employees and reported to them the progress of the negotiations. They were informed of Respondent's plea of inability to pay a wage increase, and that the Union had requested to see the books of Respondent. At the Union meeting of February 20, 1964, the employees were informed that if the books were not made available, a charge would be filed. At the Union meetings of March 4, the employees were informed that charges had been filed. A strike was discussed, and it was suggested that a strike vote be taken at the next meeting. At this meeting, Union Representative Rail informed the employees that Respondent had furnished a profit and loss statement, but he stated to them that that was not enough information. At the meeting of March 11 a strike vote was taken, and the employees voted 72 to 8 for a strike. The date of the strike was not fixed. At the meeting of April 2, Rail reported that the Union was making no headway in the negotiations, and that apparently the only alternative was to strike. By a unanimous standing vote, the employees

[8] *Yakima Frozen Foods,* 130 NLRB No. 128; C.A. D.C. decision reported in 52 LRRM 2537; *Truitt Manufacturing Company,* S.C., 38 LRRM 2042.

voted to strike. The strike commenced that day and still is in progress.

The General Counsel contends that the strike was caused by Respondent's refusal to bargain by its refusal to furnish the necessary financial data, and Respondent contends that the strike is purely economic, that is, to get Respondent to accede to the Union's wage and other contract proposals.

I conclude and find that the strike was caused by Respondent's refusal to bargain in good faith with the Union by its refusal to substantiate properly its plea of inability to pay a wage increase. That the Union was also seeking to have Respondent release all of its financial data does not mitigate the fact that the strike was also caused by Respondent's unfair labor practice found herein.

E. Respondent's failure to meet with the Union prior to the settlement agreement of October 29, 1963

By Respondent's conduct described above in preceding paragraphs, it has violated the provisions of a settlement agreement approved on October 29, 1963, providing that it would bargain collectively with the Union pursuant to the provisions of the Act.

On June 11, 1963, the Regional Director of the Twenty-first Region of the Board issued certification of the Union as the exclusive collective bargaining representative of Respondent's employees in the aforesaid unit. On June 13, 1963, William Rail of the Union wrote E. K. Shaw, President of Respondent, requesting a bargaining meeting. On June 20, Shaw replied declining the request stating that exceptions to the Regional Director's report would be filed. On September

5, 1963, Alfred Klein, attorney for the Union wrote Peter Irwin, an attorney for Respondent, requesting contractual negotiations. There was no response to this letter, and contract negotiations did not commence until after the execution and approval of the settlement agreement on October 29, 1963, in Case No. 21-CA-5553.

I find that Respondent did refuse to deal with the Union from time of initial request to bargain on June 13, 1963, until after the settlement agreement on October 29, 1963, and that since that time Respondent has met with the Union and has engaged in contract negotiations as described in preceding paragraphs.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the findings of fact and the entire record in the case, I make the following:

V. Conclusions of Law

1. Metlox Manufacturing Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. International Brotherhood of Operative Potters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including shipping and receiving employees, and lead men employed by the Respondent at its Manhattan Beach, California, plant, excluding office clerical employees, watchmen, guards, designers, professional employees and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union has been at all times material herein, and is now, the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to bargain collectively in good faith with the Union as described in this decision, the Respondent has thereby engaged in unfair labor practices proscribed by Section 8(a)(5) of the Act.

6. The strike of employees in the appropriate unit which began in April, 1964, was caused by unfair labor practices of Respondent.

7. The unfair labor practices committed by Respondent following the settlement agreement approved October 29, 1963, warrant the vacating of the said settlement agreement.

8. By the conduct described in this decision Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

VI. The remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action as provided in the recommended order below, which I find necessary to remedy and to remove the effect of the unfair labor practices, and to effectuate the policies of the Act.

Since the strike of employees which commenced in April, 1964, was and is an unfair labor practice strike, I shall recommend that the employees who engaged therein shall be offered, upon request, full reinstatement to their former or substantially equivalent positions, without prejudice to seniority or other rights and privileges, if necessary by discharging other employees who may have replaced them, and I shall further recommend that Respondent make them whole for any loss of earnings suffered following request for reinstatement, by payment to each of a sum of money equal to that which each respectively would normally have earned as wages from date of request for reinstatement until date of Respondent's offer of reinstatement, less net earnings if any during that period, together with interest on the resulting amount; backpay and interest to be computed in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co., Inc.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER

Metlox Manufacturing Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the International Brotherhood of Operative Potters, AFL-CIO, by refusing, upon request, to substantiate its claim of inability to pay any wage increase or other monetary benefits.

(b) Interfering in any manner with the efforts of said Union to bargain collectively on behalf of all employees in the following appropriate unit:

> All production and maintenance employees, including shipping and receiving employees, and leadmen employed by the Respondent at its Manhattan Beach, California, plant, excluding office clerical employees, watchmen, guards, designers, professional employees and supervisors as defined in the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Upon request, bargain collectively with the said Union as the exclusive representative of all its employees in the aforesaid bargaining unit with respect to rates of pay, wages, hours of employment, or terms or conditions of employment.

(b) Upon application, reinstate the striking employees to their former or substantially equivalent positions, without prejudice to their seniority or other

rights and privileges, and make them whole for any loss of earnings resulting from a failure to reinstate, in the manner set forth above in the section entitled, "The remedy."

(c) Post at its plant in Manhattan Beach, California, copies of the notice attached hereto and marked Appendix.[4] Copies of said notice to be furnished by the Regional Director for the Twenty-first Region shall, after being duly signed by a managing representative of Respondent be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Twenty-first Region, in writing, within 20 days from the date of the receipt of this decision what steps it has taken to comply herewith.[5]

---

[4]In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words, "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words, "A DECISION AND ORDER."

[5]In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said

(This footnote is continued on the next page)

It is further recommended that unless, within 20 days from the date of the receipt of the Trial Examiner's Decision, the Respondent shall notify the said Regional Director, in writing, that it will comply with the foregoing recommendations the National Labor Relations Board issue an order requiring Respondent to take the aforesaid action.

Dated:

/s/ JAMES R. WEBSTER
James R. Webster
Trial Examiner

Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with the INTERNATIONAL BROTHERHOOD OF OPERATIVE POTTERS, AFL-CIO, by refusing, upon request, to substantiate our claim of inability to pay any wage increase or other monetary benefits.

WE WILL NOT in any other manner interfere with the efforts of the above-named Union to bargain collectively on behalf of the employees in the following described appropriate unit:

All production and maintenance employees, including shipping and receiving employees, and leadmen employed at our Manhattan Beach, California, plant, excluding office clerical employees, watchmen, guards, designers, professional employees, and supervisors as defined in the Act.

WE WILL, upon request, bargain collectively with the above-named Union as the exclusive representative of all our employees in the unit described above with respect to rates of pay, wages, hours of employment, or terms or conditions of employment.

WE WILL, upon application, reinstate our striking employees to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings resulting from a failure to reinstate.

METLOX MANUFACTURING COMPANY
(Employer)

Dated .... By ....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 849 So. Broadway, Los Angeles, California 90014 (Tel. No. 688-5204), if they have any question concerning this notice or compliance with its provisions.

APPENDIX B.

Withdrawn Opinion of United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Metlox Manufacturing Company, Petitioner, vs. National Labor Relations Board, Respondent. No. 20,299

[February 6, 1967]

On Petition to Set Aside Decision and Order of the National Labor Relations Board.

Before: Washington,* Barnes and Browning, Circuit Judges.

Washington, Senior Circuit Judge:

This case turns on the extent to which the Company must disclose to the Union representing its employees the salaries it pays to its management. The Company claimed that it could not pay a wage increase or grant other economic benefits to its employees, because of financial inability on its part. The Union suggested that this inability might be due to a deliberate bleeding of the assets by officers and/or controlling stockholders. The Company's reply offered to allow the Union to choose a Certified Public Accountant, subject to the Company's approval, and to permit him to examine the Company's books. The examination was to be made in the Company's office, with the cost borne by the Union. However, the details of the Company's financial records were—said the Company—not to be disclosed to the Union or any third parties, though the

*George T. Washington, Senior United States Circuit Judge, sitting by designation.

C.P.A. could advise the Union whether or not the Company's profit and loss statements "were true".

The Union was dissatisfied with the amount of disclosure obtained, and ultimately called a strike. The Board, after holding a hearing, concluded that the Company had refused to bargain in good faith with the Union, in violation of Section 8(a)(5) and (1) of the Act, and that it had unduly restricted the Union's examination of its financial and other records. The Board found that the strike was caused by the Company's refusal to bargain in good faith.

The Board's order directed the Company to cease and desist from refusing to bargain in good faith with the Union, and from interfering in any manner with the efforts of the Union to bargain collectively. The Company was ordered, affirmatively, to bargain collectively with the Union upon request; to reinstate the striking employees upon application; to make them whole for any loss of earnings resulting from a failure to reinstate; and to post appropriate notices.

Whatever else may be said about the claims advanced on either side, it seems clear that the profit and loss statements furnished by the Company did not disclose sufficient information from which a fair judgment could be made by the Union as to the Company's claimed inability to pay a wage increase. In substance, such was the testimony of the C.P.A. chosen by the Union and approved by the Company. The information sought by the Union as to payments to the management group, and denied to it by the Company, was under the circumstances not only relevant, but also "reasonably necessary", to the Union's role as bargaining agent. *Curtiss-Wright Corp. v. N.L.R.B.*, 347 F.2d 61, at 68 (C.A. 3, 1965).

For these reasons, the petition for review will be denied, and the Board's Order will be

ENFORCED.

Barnes, Circuit Judge, concurring:

The parties here are in substantial accord as to the applicable law. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), stands for the proposition that where an employer claims inability to pay, he is required to substantiate that claim. The Court in *Truitt* indicated that whether substantiation was to be required should turn upon the particular facts of each case. The Company does not resist substantiation here, so we are not faced with determining whether the fact situation here would require it absent the Company's agreement.

But the issue remains whether the Company may limit the scope of disclosure of the audit consistent with its obligation of good faith in bargaining. I think that it may. The question then remains—does the limitation proclaimed by the Company go so far as to constitute a lack of good faith?

First we note that the only concern we have for substantiation of the Company's financial statements derives from its claim of inability to pay the requested increases in wages. *Cf., United Fire Proof Warehouse Co. v. NLRB*, 356 F.2d 494 (7th Cir. 1966). The purpose in presenting the financial statements to the Union was to sustain the Company's claim of financial disability to pay higher wages. If those statements are accurate, it would seem that the Company has gone far enough to meet the burden upon it "to furnish to the Union relevant data to enable the representative effectually to bargain for the workers." *Sinclair Re-*

fining Co. v. NLRB, 306 F.2d 569 (5th Cir. 1962). Inability to pay is logically based upon operations which are conducted at a negligible profit or at a loss. Statements which accurately reflect a negligible profit or a loss *a fortiori* are enough to sustain a good faith claim of inability to pay. The details of accurate financial statements may or may not be irrelevant to the question of whether the Company's claim of inability was made in good faith.[1] *Cf., NLRB v. Movie Star, Inc.,* 361 F.2d 346, 349 (5th Cir. 1966). Of course, if the statements are false or substantially inaccurate they would not be substantiation of a good faith claim under *NLRB v. Truitt Mfg. Co., supra.*

This court can take judicial notice of the practice of certified public accountants in rendering an opinion in connection with financial statements. The opinions generally are either (1) unqualified; (2) qualified;

---

[1]The Union requested details of seven items on the profit and loss statement:

Net Sales (total sales less sales discounts)
Factory and Shipping Wages
Other Salaries and Wages
Materials, Supplies, Expenses
Advertising and Commissions
Financial Expenses, Interest, Factoring
Depreciation

We point out that details of the second item, Factory and Shipping Wages, would be relevant in bargaining on wages, hours and work standards, and those details must be given to the Union in context with such bargaining. We perceive that the Company does not object to presenting such information. (See Petitioner's Opening Brief, pp. 3-4.)

But the inquiry in this case concerns the Company's ability to pay. If the statements as a whole are correct, the details are not germane to the issue. Even the details of Factory and Shipping Wages would be irrelevant on this question. An item may be relevant in one context and irrelevant in another. *Sylvania Elec. Prod., Inc. v. NLRB,* 358 F.2d 591 (1st Cir. 1966).

(3) adverse; or (4) a disclaimer of an opinion. See Statements on Auditing Procedure, No. 32 (American Institute of Certified Public Accountants, September 1962). We see no reason why the opinion of the accountant would not completely answer the relevant inquiry of the Union, viz. the accuracy of the statements.

If the certified public accountant were to render an adverse opinion, *i.e.*, that the statements were false and misleading, knowledge by the Union of details would be irrelevant because the Company's claim would have been shown to be in bad faith. Similarly, if the opinion is unqualified, *i.e.*, that the statements fairly and accurately present the results of operations, the Union can have no justification for sifting through the details since the claim of inability has been shown to be in good faith. Qualified opinions and situations where the accountant declines to render an opinion usually result from limitations on the scope of his inquiry. Here the auditor has made it clear he can come to no conclusion as to accuracy until he has further information, as for example, the cost of inventory, method of depreciation, etc. The limitations apply to what he may disclose, not to what he may learn.

I conclude that the substantiation of the good faith claim of inability to pay requires the employer to present accurate financial statements to the employees' representative in sufficient detail to convince him of their fundamental accuracy. For that reason, I would

enforce an order, but not the order proposed by the Board in this case.

The Board's order is far from specific in its directions to the employer. It merely orders Metlox to cease and desist from refusing to substantiate its claim of inability to pay. In light of the Union's accountant's evaluation of what information was necessary to properly evaluate the employer's claim of inability to pay, the Board's order should (as an example only) be limited to requiring the employer to provide income statements, balance sheets and cash flow statements for the last five years, including a breakdown of inventory and depreciation, with a description of the methods used in determining such figures. I believe that if the Board's order is enforced as it stands, this case will make law beyond the implications of the facts of this case.

APPENDIX C.

Opinion of United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Metlox Manufacturing Company, *Petitioner,* vs. National Labor Relations Board, *Respondent.* No. 20,299.

[Revised May 5, 1967]

On Petition to Set Aside Decision and Order of The National Labor Relations Board.

Before: Washington*, Barnes and Browning, Circuit Judges.

Washington, Senior Circuit Judge:

The Company in this case claimed that it could not give a wage increase or grant other economic benefits to its employees because of financial inability on its part. The Union suggested that the inability to pay might be due to inefficient management, to excessive executive salaries, or to a bleeding of the assets by controlling stockholders. The Company's reply offered to allow the Union to choose a Certified Public Accountant, subject to the Company's approval, and to permit him to make an unlimited examination of the Company's books. The examination was to be made in the Company's office, with the cost borne by the Union. However, the details of the Company's financial records were—said the Company—not to be disclosed to the Union or to any third parties. The C.P.A. could only advise the Union whether or not the Com-

*George T. Washington, Senior United States Circuit Judge, sitting by designation.

pany's profit and loss statements "were true" and perhaps, although the offer was found by the Board not to be clear on this point, whether or not the statements constituted fair representations of the Company's actual financial position.

The Union was dissatisfied with the amount of disclosure permitted by this offer, and ultimately called a strike. The Board, after holding a hearing, concluded that the Company had refused to bargain in good faith with the Union, in violation of Sections 8(a)(5) and (1) of the National Labor Relations Act, in that it had unduly restricted the Union's access to details of its financial and other records. It said:

> "* * * A union is not entitled to review the records of Respondent" [the Company] for the purpose of enabling "the Union to suggest or urge efficiency or other changes which could make more funds available for wages. * * * But, good faith bargaining, in requiring an employer to substantiate his inability-to-pay plea, requires the employer to show that the figures of profit and loss are not only accurate but that they do or do not constitute fair representations of the company's financial condition."
>
> * * * * *
>
> We "find that Respondent in limiting the accountant to a 'yes or no' report is not substantiating or permitting substantiation of its inability-to-pay plea, and by this conduct it has not bargained in good faith." [Footnote citations omitted.] We "cannot with preciseness indicate here the scope that the accountant's report should take. Elaboration

> or explanation of his conclusions should be permitted; on the other hand, the report need not be an efficiency survey and critique."*

The Board found that the strike was caused by the Company's refusal to bargain in good faith.

The Board's order directed the Company to cease and desist from refusing to bargain in good faith with the Union, and from interfering in any manner with the efforts of the Union to bargain collectively. The Company was ordered affirmatively to bargain collectively with the Union upon request; to reinstate the striking employees upon application; to make them whole for any loss of earnings resulting from a failure to reinstate; and to post appropriate notices.

Whatever else may be said about the claims advanced on either side, it seems clear that the Board could properly conclude that it was inconsistent with good faith bargaining for the Company to insist upon limiting disclosure by the accountant to the Union to a naked "yes or no" answer as to whether the profit and loss statements furnished by the Company fairly reflected the Company's financial condition. A reasonable amount of explanation and elaboration seems not only to be relevant but also "reasonably necessary" to enable

---

*And see the Full Board's summary of its holding in this case in *White Furniture Co.*, 161 N.L.R.B. No. 23, 63 L.R.R.M. 1227 (1966), where it said in part:

> "The Board has also declined to require an employer to give a union such sensitive information as executive salaries and detailed breakdowns of operating expenses.[10]

[10]Metlox Manufacturing Company, supra, footnote 7, at 1394-95. The Board there approved a check of the employer's books by a union accountant, limited to the purposes of verifying profit and loss figures offered by the employer and determining whether there were any factors that would make the employer's figures misleading."

the Union, in its role as bargaining agent, to form a fair judgment as to the Company's claimed inability to meet any of the Union's demands. *Curtiss-Wright Corp. v. NLRB,* 347 F. 2d 61, 68 (3d Cir. 1965).

The Board properly refrained from specifying in advance precisely what details must be furnished to render the accountant's report meaningful to the Union. That determination must necessarily await the event.

The petition for review will be denied, and the Board's order will be enforced.

Barnes, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's conclusion that the petitioner Metlox did not bargain in good faith when it restricted the Union auditor to a "yes or no" conclusion as to whether the previously submitted profit and loss statements were "true". I dissent from the enforcement of the Board's order in its present form.

The parties here are in substantial accord as to the applicable law. *NLRB v. Truitt Mfg. Co.,* stands for the proposition that where an employer claims inability to pay, he may be required to substantiate that claim. The Court in *Truitt* indicated that whether substantiation was to be required should turn upon the particular facts of each case. The employer here does not resist substantiation here, so we are not faced with determining whether the fact situation would require it absent the employer's agreement.

The issue is whether the employer may limit the scope of disclosure of the audit consistent with its obligation of good faith in bargaining. I think that it may, and the Board apparently agrees. See *White*

Furniture Co., 161 N.L.R.B. No. 23, 63 L.R.R.M. 1227 (1966). The question then becomes—does the limitation proclaimed by the employer here go so far as to constitute a lack of good faith?

The only concern we have here for substantiation of the employer's financial statements derives from its claim of inability to pay the requested increases in wages. *Cf., United Fire Proof Warehouse Co. v. NLRB*, 356 F.2d 494 (7th Cir. 1966). The purpose in presenting the financial statements to the Union was to sustain the employer's claim of financial disability to pay higher wages. If those statements are fair and accurate, it would seem that the employer has gone far enough to meet the burden upon it "to furnish to the Union relevant data to enable the representative effectually to bargain for the workers." *Sinclair Refining Co. v. NLRB*, 306 F.2d 569, 571 (5th Cir. 1962). Inability to pay is logically based upon operations which are conducted at a negligible profit or at a loss. Statements which fairly reflect a negligible profit or a loss *a fortiori* are enough to sustain a good faith claim of inability to pay. The details of accurate financial statements may or may not be irrelevant to the question of whether the employer's claim of inability was made in good faith.[1] *Cf., NLRB v. Movie Star,*

---

[1]The Union requested details of seven items on the profit and loss statements:

Net Sales (total sales less sales discounts)
Factory and Shipping Wages
Other Salaries and Wages
Materials, Supplies, Expenses
Advertising and Commissions
Financial Expenses, Interest, Factoring
Depreciation

We point out that details of the second item, Factory and Shipping Wages, would be relevant in bargaining on wages,

(This footnote is continued on the next page)

Inc., 361 F.2d 346, 349 (5th Cir. 1966). Of course, if the statements are false or substantially inaccurate they would not be substantiation of a good faith claim under *NLRB v. Truitt Mfg. Co., supra.*

To show that the statments are fair reflections of what they purport to represent means more than demonstrating clerical precision or accuracy, as the Board's analysis here suggests. See C.T. p. 46, ll. 35-42. Abnormal items or unusual treatment can make clerically accurate statements misleading. The liquidation of inventories valued on the last-in, first-out basis could significantly distort figures reflecting operations, as could accelerated depreciation or changes in accounting methods. If any such distorting factors exist, the accountant should be free to disclose the existence of such factors and their net effect upon the financial statements. Yet such disclosure would not require the employer to sacrifice the confidentiality of its records by allowing indiscriminate revelation of any details which the accountant might choose to disclose.

The Board's order, which the process of this court will enforce, does not tell Metlox what it must do. Metlox has at all times been willing to substantiate its claim of inability to pay the requested wage increases. The Board's order, without elaboration, merely tells

---

hours and work standards, and those details must be given to the Union in context with such bargaining. We perceive that the employer does not object to presenting such information. See Petitioner's Opening Brie, pp. 3-4.

But the inquiry in this case concerns the employer's ability to pay. If the statements as a whole are correct and fair, the details are not germane to the issue. Even the details of Factory and Shipping Wages would be irrelevant on this question. An item may be relevant in one context and irrelevant in another. *Sylvania Elec. Prod., Inc. v. NLRB,* 358 F.2d 591 (1st Cir. 1966).

Metlox that it must substantiate its claim, and it must now do so on pain of contempt. The vague generalities of the majority[2] and the Board's order offer no indication of what Metlox must do to comply with the law. Such an approach, in my opinion, negates the suggestion that the employer may, within a certain range, retain the confidentiality of its records.

I would enforce the Board's order modified to provide that in substantiating its claim the employer can limit the accountant to (1) a "yes or no" answer to whether the financial statements are, within a reasonable degree, clerically accurate, and (2) the disclosure of the existence of any items which, in the judgment of the accountant, might have significantly distorted the figures reflecting operations and the net effect of such distortion, if any.

---

[2]"A reasonable amount of explanation . . ."
". . . details [which] must be furnished to render the accountant's report meaningful to the Union."

APPENDIX D.

Decree.

United States Court of Appeals, for the Ninth Circuit.

Decree Approved:

George T. Washington
U.S. Circuit Judge.

.....

U.S. Circuit Judge.
James M. Browning
U.S. Circuit Judge.

Metlox Manufacturing Company, Petitioner, v. National Labor Relations Board, Respondent. No. 20,299. Before: Washington,* Barnes and Browning, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of Metlox Manufacturing Company, to review and set aside a certain order of the National Labor Relations Board issued against petitioner, on July 12, 1965, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on December 5, 1966, and has considered the briefs and the transcript of record filed in this cause.

On May 5, 1967, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby,

---

*George Washington, Senior United States Circuit Judge, sitting by designation.

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that Metlox Manufacturing Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the International Brotherhood of Operative Potters, AFL-CIO, by refusing, upon request, to substantiate its claim of inability to pay any wage increase or other monetary benefits.

(b) Interfering in any manner with the efforts of said Union to bargain collectively on behalf of all employees in the following appropriate unit:

> All production and maintenance employees, including shipping and receiving employees, and leadmen employed by the Respondent at its Manhattan Beach, California, plant, excluding office clerical employees, watchmen, guards, designers, professional employees and supervisors as defined in the Act.

2. Take the following affirmative action which it has been found will effectuate the policies of the Natioal Labor Relations Act (hereinafter called the Act).

(a) Upon request, bargain collectively with the said Union as the exclusive representative of all its employees in the aforesaid bargaining unit with respect to rates of pay, wages, hours of employment, or terms or conditions of employment.

(b) Upon application, reinstate the striking employees to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings resulting from a failure to reinstate, in the

manner set forth above in the section of the Decision of Trial Examiner of the National Labor Relations Board, dated February 4, 1965, entitled, "The remedy."

(c) Notify the above-mentioned employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(d) Post at its plant in Manhattan Beach, California, copies of the notice attached hereto and marked Appendix. Copies of said notice to be furnished by the Regional Director for the Thirty-first Region (Los Angeles, California) of the National Labor Relations Board, shall, after being duly signed by a managing representative of Respondent be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decree what steps it has taken to comply therewith.

Endorsed, Decree Filed and Entered

/s/ William B. Luck
William B. Luck
Clerk

A TRUE COPY,
ATTEST:
William B. Luck
Clerk

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO

A Decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with the INTERNATIONAL BROTHERHOOD OF OPERATIVE POTTERS, AFL-CIO, by refusing, upon request, to substantiate our claim of inability to pay any wage increase or other monetary benefits.

WE WILL NOT in any other manner interfere with the efforts of the above-named Union to bargain collectively on behalf of the employees in the following described appropriate unit:

All production and maintenance employees, including shipping and receiving employees, and leadmen employed at our Manhattan Beach, California, plant, excluding office clerical employees, watchmen, guards, designers, professional employees, and supervisors as defined in the Act.

WE WILL, upon request, bargain collectively with the above-named Union as the exclusive representative of all our employees in the unit described above with respect to rates of pay, wages, hours of employment, or terms or conditions of employment.

WE WILL, upon application, reinstate our striking employees to their former or substantially equiv-

alent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings resulting from a failure to reinstate.

METLOX MANUFACTURING COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

NOTE: We will notify the above-mentioned employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 215 West 7th St., Los Angeles, California 90014 (Tel. No. 688-5801), if they have any question concerning this notice or compliance with its provisions.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 739

METLOX MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 39–45) is reported at 378 F. 2d 728. The Board's decision and order (Pet. App. 1–32) are reported at 153 NLRB 1388.

JURISDICTION

The revised decision of the court of appeals was rendered on May 5, 1967 (Pet. App. 39), and a decree was entered on July 21, 1967 (Pet. App. 46). The petition for a writ of certiorari was filed on October 18, 1967. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

282-240—67

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the employer violated his statutory obligation to bargain in good faith by refusing, during the course of contract negotiations, to furnish financial information to permit the union to evaluate the employer's asserted inability to pay a wage increase.

2. Whether there is substantial evidence to support the Board's finding that the strike in which the employees engaged was caused by their employer's unfair labor practices.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pp. 3–4 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On June 11, 1963, the Union[1] was certified as the exclusive collective bargaining representative of petitioner's employees (Pet. App. 5–6). Negotiations between the parties began on November 18, 1963, when the Union submitted contract proposals calling for a wage increase of 35 cents an hour and fringe benefits (Pet. App. 8; G.C. Ex. 2(b), pp. 23–24). The Company rejected the proposal on November 29, claiming that it was financially unable to grant any wage increase (Pet. App. 8; G.C. Ex. 2(b), pp. 25, 46, 86). On December 18, 1963, the Union requested that the

[1] International Brotherhood of Operative Potters, AFL-CIO.

Company's financial records be made available to its auditor (Pet. App. 8; G.C. Ex. 2(c), pp. 93–94). The Company responded by supplying the Union with a statement of the Company's profit and loss figures for the calendar years 1961, 1962, and the first 10 months of 1963 (Pet. App. 8–9; G.C. Ex. 4).

On January 17, 1964, the Union advised the Company that, "[i]n our opinion * * * your summary of financial items is insufficient to enable the union to meet its obligations of bargaining in good faith." The Union requested "information and data" substantiating the figures set forth in the profit and loss statement. It also requested that this information be supplied through an audit conducted by a mutually acceptable certified public accountant (R. 10; G.C. Ex. 3(a)).

The Company agreed to an inspection of its financial records by an accountant chosen by the Union, on the conditions that the accountant would not disclose the "details of the Company's financial records * * * to any third parties whatsoever, including the Union" and that he would only inform the Union whether or not the representations contained in the profit and loss statement "were true" (Pet. App. 10–11; G.C. 3(d)). The Union objected to these conditions, stating that the proposed restrictions upon its access to the details of the Company's financial records precluded it from making an intelligent assessment of the Company's claim of financial inability to grant wage increases (Pet. App. 12, 14–15; G.C. Exs. 2 (e) and (g)). In turn, the Company continued to

"stand on our right not to have the details of the various classifications of expense, other than that pertaining to the factory and shipping employees, made available to the Union for any purpose" (Pet. App. 15–17; G.C. Ex. 3(h)).

Throughout the negotiations, the Union met periodically with the employees to inform them of any developments. The employees were told of the Company's claim that it was financially unable to pay higher wages and that a request had been made to examine the Company's books (Pet. App. 23; Tr. 154–157). On February 20, 1964, the Union informed the employees that little headway was being made in their request to have the Company's books opened and "if there was no decision reached on it [it] would be forced to file refusal-to-bargain charges" (R. 23; Tr. 160, 157–158). On March 4, the employees were told that the Union had received a profit and loss statement, but that it contained insufficient information. The employees were also told that an unfair labor practice charge had been filed (Pet. App. 23; Tr. 161–163). On March 11 the employees voted in favor of a strike but no date was set (Pet. App. 23; Tr. 163). On April 1 the Union reported that no progress was being made and that the only alternative was to strike (Pet. App. 23–24; Tr. 166–167). The strike commenced on April 2, 1964 (Pet. App. 24; Tr. 168).

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

Upon the foregoing facts, the Board found that the Company had violated Section 8(a) (5) and (1) of

the National Labor Relations Act by unduly restricting the Union's examination of its financial records for the purpose of evaluating the Company's claimed inability to grant a wage increase. The Board also found that the strike was caused by the Company's refusal to bargain in good faith. The Board ordered the Company to cease and desist from the unfair labor practices found and upon application to reinstate the striking employees with backpay (Pet. App. 1–3, 17–32).[2]

The court of appeals sustained the Board's finding that "it was inconsistent with good faith bargaining to insist upon limiting disclosure by the accountant to the Union to a naked 'yes or no' answer as to whether the profit and loss statements furnished by the Company fairly reflected the Company's financial condition. A reasonable amount of explanation and elaboration seems not only to be relevant but also 'reasonably necessary' to enable the Union, in its role as bargaining agent, to form a fair judgment as to the Company's claimed inability to meet any of the Union's demands" (Pet. App. 41–42). The court accordingly

[2] With respect to the steps the Company is required to take to comply with the Board's order, the Trial Examiner, whose decision the Board adopted, stated (Pet. App. 23):

> I find that Respondent in limiting the accountant to a "yes or no" report is not substantiating or permitting substantiation of its inability-to-pay plea, and by this conduct it has not bargained in good faith. I cannot with preciseness indicate here the scope that the accountant's report should take. Elaboration or explanation of his conclusions should be permitted; on the other hand, the report need not be an efficiency survey and critique. [Footnote omitted.]

sustained the Board's findings and enforced its order in full (Pet. App. 42).[3]

ARGUMENT

The decision of the court of appeals, which turns on the particular facts of this case, is correct and is not in conflict with the decisions of this Court or those of any other circuit. There is no occasion for further review.

1. This Court has recognized that an employer violates his statutory obligation to bargain in good faith if he refuses during the course of contract negotiations to produce information substantiating a claim that he cannot afford to grant a wage increase. The Court has said that, if an asserted inability to pay an increase in wages "is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy" *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152–153. Petitioner does not question this principle. It presents only the narrow issue whether its offer to permit the Union accountant to examine its records solely for the purpose of reporting to the Union whether the Company's profit and loss statements were true or false satisfied its obligation under the *Truitt* rule. The Board and the court below properly concluded that the limited disclosure would not enable the Union to make "a fair judgment" as to the Company's claimed inability to grant

[3] One member of the court of appeals concurred with the majority as to the violation found, but would have modified the Board's order (Pet. App. 42–45).

wage increases (Pet. App. 41–42, 21–22). As the Board pointed out, on the basis of expert testimony in the record, a profit and loss summary does not necessarily reflect an accurate picture of a company's financial condition. It is simply one factor to consider in arriving at a judgment as to the Company's financial condition (Pet. App. 19–21, 44; Tr. 67–69, 71, 77, 79–80, 83–84, 86–92, 98, 103–105, 115–116). The inadequacy of such a statement necessarily requires "a reasonable amount of explanation and elaboration" to permit the Union to perform its functions in an intelligent and meaningful fashion.

Contrary to petitioner's contention (Pet. 10–11), there is no conflict between the decision below and *Fruit and Vegetables Packers, Etc.* v. *National Labor Relations Board,* 316 F. 2d 389 (C.A.D.C.). There, unlike here, the employer made available to a union-designated accountant its books and records without limiting the information he could give to the union. The only conditions that the employer sought to impose over the union's objection and that the Board and the court of appeals held to be permissible were that questions concerning the employer's records would be directed to its accountant and that the union would designate a licensed public accountant.[4]

[4] The Board's decision in *Albany Garage, Inc.*, 126 NLRB 417, cited by petitioner (Pet. 11), is also distinguishable from the instant case. There, the employer furnished to the union its financial statement, together with a comparative sales and profit statement. The accuracy of those statements was not questioned nor had the union in its prior negotiations with the employer rejected them as inadequate. In those circumstances

Petitioner's further contention (Pet. 9) that the Board's order, as enforced by the court below, does not enable it to determine what additional disclosure it must make to the Union is insubstantial. The Board's order requires petitioner to cease and desist from refusing to bargain collectively "by refusing, upon request, to substantiate its claim of inability to pay any wage increase or other monetary benefits" (Pet. App. 28). Precisely what information may be necessary to substantiate petitioner's claim of inability to pay cannot of course be pin-pointed in advance of a requested analysis of respondent's accounting practices, their consistency from year to year, the treatment accorded inventory, depreciation, and any non-recurring or unusual items, and other matters familiar to accountancy. The particular categories of information that the designated accountant may require will thus depend on the problems of financial analysis he encounters in the circumstances of petitioner's business. Nevertheless, the Board's order does afford a reasonable standard: Petitioner must supply the information needed for evaluation of the claim that it laid on the bargaining table.

2. Petitioner also contends (Pet. 13–14) that the court below erred in affirming the Board's finding that the strike of April 2, 1964, resulted from the Company's refusal to bargain in good faith with the Union.[5] This presents only an evidentiary issue which

---

the Board concluded that it was unneccessary for the union to have access to the books and records of the employer in order to assess the latter's claimed inability to grant wage increases.

[5] "It is well established that 'a strike may be an unfair labor practice strike even though it also has economic objectives.'"

does not warrant further review. *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502–503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. In any event, the facts summarized in the Statement, *supra*, pp. 2–4, show that the Board's findings are adequately supported by the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

JOHN TAYLOR,
Attorney,
National Labor Relations Board.

NOVEMBER 1967.

National Labor Relations Board v. *Sea-Land Service, Inc.*, 356 F. 2d 955, 965 (C.A. 1). See also *National Labor Relations Board* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 269, (C.A. 2); *National Labor Relations Board* v. *My Store, Inc.*, 345 F. 2d 494, 498 (C.A. 7), certiorari denied, 382 U.S. 927.

U.S. GOVERNMENT PRINTING OFFICE: 1967